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In the Supreme Court of the United States

OCTOBER TERM, 1976

VELSICOL CHEMICAL CORPORATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) and its supplemental opinion on petition for rehearing (Pet. App. 26-39) are reported at 548 F. 2d 998. The decision of the Administrator of the Environmental Protection Agency (Pet. App. 136-208) is reported at 41 Fed. Reg. 7572. The recommended decision of the administrative law judge (Pet. App. 42-135) is reported at 41 Fed. Reg. 7555.

JURISDICTION

The judgment of the court of appeals (Pet. App. 40-41) was entered on November 10, 1976. A timely petition for rehearing was denied on January 6, 1977. The petition for a writ of certiorari was filed on March 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in pesticide registration suspension proceedings under the Federal Insecticide, Fungicide and Rodenticide Act, the registrant bears the burden of persuasion.

STATEMENT

1. Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 86 Stat. 976, as added and amended, 7 U.S.C. (Supp. V) 136 *et seq.*, all pesticides must be registered with the Administrator of the Environmental Protection Agency. They cannot be registered unless the Administrator first determines that they meet the requirements of 7 U.S.C. (Supp. V) 136a(c)(5), among which are that the pesticides will perform their intended functions and not cause "unreasonable adverse effects on the environment."[1]

If it appears to the Administrator that a registered pesticide no longer meets registration requirements, he may: (1) cancel a registration following an opportunity for an adjudicatory hearing;[2] (2) when he deems it necessary, suspend a registration pending the outcome of cancellation

[1]"[U]nreasonable adverse effects on the environment" means "unreasonable risk to man or the environment taking into account the economic, social, and environmental costs and benefits." 7 U.S.C. (Supp. V) 136(bb).

[2]7 U.S.C. (Supp. V) 136d(b) provides that the Administrator may cancel the registration of a pesticide if "it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this subchapter or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment."

proceedings;[3] or (3) issue an emergency suspension order, effective on issuance, without a prior hearing. This case involves suspension of registration after a hearing, pending a final cancellation decision.

The suspension provision, 7 U.S.C. (Supp. V) 136d(c)(1), provides that the Administrator may suspend the registration of a pesticide immediately if he "determines that action is necessary to prevent an imminent hazard during the time required for cancellation." The term "imminent hazard" is defined to mean "a situation which exists when the continued use of a pesticide during the time required for cancellation proceeding would be likely to result in unreasonable adverse effects on the environment or will involve unreasonable hazard to the survival of a species declared endangered or threatened by the Secretary pursuant to the Endangered Species Act of 1973." 7 U.S.C. (Supp. V) 136(*l*).

2. On December 24, 1975, the Administrator of the Environmental Protection Agency suspended most registrations of heptachlor and chlordane,[4] two chlorinated

[3]A suspension order may not be issued until after notice of intent to suspend has been given to the registrant. The notice is required to set forth "findings pertaining to the question of 'imminent hazard'," and a registrant may request an expedited hearing under 7 U.S.C. (Supp. V) 136d(c)(2). That statute provides that, after a hearing, the presiding officer has ten days to submit recommended findings and conclusions to the Administrator who, in turn, has seven days to issue a final order. 7 U.S.C. (Supp. V) 136d(c) (4) provides for expedited judicial review in the court of appeals of the final suspension order.

[4]Technical grade heptachlor and chlordane are complex mixtures of related chemicals. Both contain heptachlor, gamma-chlordane and nonachlor (Pet. App. 47, 48). Chlordane also contains alphachlordane (Pet. App. 47). Heptachlor can be converted to the more persistent heptachlor epoxide through oxidation in the soil and metabolism in plants and animals (*id.* at 48). Chlordane is metabolized into the more persistent oxychlordane (*id.* at 49). Neither of the chemicals, nor any of their components or metabolites, occurs naturally. Petitioner is their sole manufacturer (*id.* at 43).

hydrocarbon pesticides[5] (Pet. App. 136-202). Based upon the evidence that these chemicals found their way into the food supply, and that they created a significant risk of cancer (Pet. App. 48-56), the Administrator determined that continuation of certain uses of the two chemicals during the time required to reach a final decision in the cancellation proceedings would create an "imminent hazard."[6] Therefore, as Section 6(c) of FIFRA, 7 U.S.C. (Supp. V) 136d(c), requires in light of this finding, the Administrator suspended those uses of the pesticides.[7]

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[5]Chlorinated hydrocarbon pesticides, which include DDT, aldrin, dieldrin, heptachlor, chlordane, endrin, and toxaphene, have been widely used. Since the 1960s the effects on man and the environment of these chemicals have been the subject of intense concern. See Department of Health, Education, and Welfare, *Report of the Secretary's Commission on Pesticides and their Relationship to Environmental Health* 470-478 (1969). On June 14, 1972, the Administrator cancelled almost all registrations of DDT. That decision was upheld. *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 489 F. 2d 1247 (C.A. D.C.). On October 1, 1974, the Administrator suspended the major uses of aldrin and dieldrin. That order also was affirmed. *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 510 F. 2d 1292 (C.A. D.C.).

[6]The Administrator's findings and conclusions (Pet. App. 136-208) were based on the record developed at the 43-day adjudicatory hearing. The issues at that hearing were limited to three areas of concern: (1) the human cancer risk posed by pesticidal uses of heptachlor and chlordane; (2) the contamination levels of man and his food supply as established by tissue levels and food residues; and (3) the benefits of the registered uses, with particular emphasis on the availability of alternatives. 40 Fed. Reg. 34456.

[7]The Administrator suspended all heptachlor and chlordane registrations for household lawn, garden, and turf uses, use to control ticks and chiggers, and all agricultural uses, with a limited number of exemptions. These exempted agricultural uses include heptachlor as a seed dressing and for application on Hawaiian pineapples, and chlordane for control of cutworms on corn (until August 1, 1976), white-fringed beetles in eight Southern states, strawberry pests, root weevils in Florida citrus, and white grubs in Michigan. Nonagricultural uses which were not suspended include heptachlor on narcissus bulbs and chlordane in federal and state quarantine programs for control of fire ants, control of black vine weevils in Michigan, and control of harvester ants in Oklahoma (Pet. App. 199-201).

3. Petitioner sought judicial review, arguing that the Administrator's findings concerning cancer in mice and rats are unsupported by substantial evidence. Petitioner also argued that heptachlor and chlordane are not animal carcinogens at low dose levels and that the amounts of these chemicals to which humans are exposed are too small to be a cancer hazard. Finally, petitioner argued that the Administrator has the burden of showing that substances pose an imminent danger to human health.[8]

The court of appeals upheld the Administrator's decision in all pertinent respects. It first explained that the registrant of a pesticide has the burden of demonstrating that it should continue to be in use (Pet. App. 8-9) and that, once the Administrator determines that a pesticide creates a risk of cancer, he should suspend the registration unless there is strong evidence that the economic benefits of the pesticide outweigh that risk (*id.* at 11). The court concluded that laboratory studies establish that chlordane and heptachlor are carcinogens and that their persistence makes them dangerous to man (*id.* at 12-24). Consequently, the court sustained the suspension.[9]

Petitioner sought rehearing, arguing that the court of appeals' decision concerning burdens of proof was mistaken. The court of appeals denied the petition for rehearing. It first reiterated its conclusion that the Administrative Procedure Act's provision with respect to burdens

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[8]The Environmental Defense Fund (EDF) and the Secretary of Agriculture also petitioned for review. EDF contended that the Administrator had not justified his decision not to suspend some uses of the pesticides and had not explained his decision to permit use of existing stocks. The Secretary argued that benefits of continued use outweighed the risks.

[9]The court of appeals upheld the Administrator's decision not to suspend the registration of heptachlor and chlordane with respect to certain limited uses (Pet. App. 24-25).

(5 U.S.C. 556(d)) pertains to the burden of coming forward with evidence but does not govern the burden of persuasion. The court held that, in any event, that provision does not govern when a different burden is "otherwise provided by statute," and FIFRA provides that the burden of persuasion is borne by the registrant of the pesticide (Pet. App. 33-39).

ARGUMENT

Petitioner contends that this case presents important issues concerning the allocation of burdens of proof and persuation under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d). It does not. Section 7(c) explicitly states that it applies only when the burden of proof is not "otherwise provided by statute." In the present case the court of appeals concluded that FIFRA is a statute containing its own rules with respect to burdens of proof (Pet. App. 33-39). The court of appeals' discussion of the allocation of burdens under Section 7(c) therefore is *dicta*, and this case is controlled entirely by FIFRA.

Petitioner does not contend that there is a conflict among the circuits concerning the interpretation of FIFRA and the allocation of burdens under that statute. Indeed, petitioner concedes (Pet. 11) that in registration or cancellation proceedings under FIFRA the applicant or registrant bears the burden of persuasion. Every court of appeals that has considered the question has reached the same conclusion. See *Dow Chemical Corp.* v. *Ruckelshaus*, 477 F. 2d 1317, 1324 (C.A. 8); *Southern National Manufacturing Co.* v. *Environmental Protection Agency*, 470 F. 2d 194, 196-197 (C.A. 8); *Continental Chemiste Corp.* v. *Ruckelshaus*, 461 F. 2d 331, 335 (C.A. 7); *Stearns Electric Paste Co.* v. *Environmental Protection Agency*, 461 F. 2d 293, 303-304 (C.A. 7).[10]

[10]See also *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F. 2d 584, 593 (C.A. D.C.); *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 465 F. 2d 528, 532 (C.A. D.C.); *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 510 F. 2d 1292, 1297 (C.A. D.C.).

Petitioner contends, however, that although the registrant bears the burden in registration and cancellation proceedings, the Administrator should bear the burden in suspension proceedings. This contention is insubstantial. The Administrator has interpreted FIFRA as placing the burden in suspension proceedings upon the registrant (40 C.F.R. 164.121(g)), and this allocation is consistent with both the purposes and the language of FIFRA. As the court of appeals explained (Pet. App. 34-36), FIFRA was amended in 1964 precisely in order to ensure that doubts about the safety of pesticides would be resolved in favor of protection of health. The reports accompanying the 1964 amendments, abolishing "registration under protest," explain that the purpose of the change is to compel registrants to assume at all times the burden of demonstrating that pesticides are not injurious to human health. See, *e.g.*, H.R. Rep. No. 1125, 88th Cong., 2d Sess. 2 (1964).

The suspension proceeding is designed to allow the Administrator to make prompt decisions when he receives evidence that a pesticide poses an imminent danger to health. It would be anomalous if the registrant bore the burden in the cancellation proceeding, yet the Administrator bore the burden in a suspension proceeding that was designed to permit dangerous pesticides to be removed from the market on a temporary basis pending a final decision in the cancellation proceedings. Petitioner has not offered any cogent reason why Congress would have required the registrant to bear the burden in the cancellation proceeding but required the Administrator to bear it in a suspension proceeding.

It is true, as petitioner points out, that FIFRA was amended in 1972 to incorporate the general standards of the Administrative Procedure Act. See 7 U.S.C. (Supp. V)

136d(c). But petitioner does not point to anything in the congressional debates surrounding that amendment that tends to demonstrate that Congress thereby altered the burdens of proof that had been established in 1964. As the court of appeals explained (Pet. App. 36-37; footnotes omitted), "[i]n light of the clarity with which Congress originally undertook to fix the burden of proof (persuasion) on the registrant, and the firmness of the courts' interpretation of the 1964 amendment, we cannot believe that the general incorporation of APA standards in 1972 was intended to shift the burden of proof away from the registrant *sub silentio*."

The court of appeals correctly interpreted FIFRA. "Congress made clear that the public was not to bear the risk of uncertainty concerning the safety of a covered poison. In the absence of an equally explicit countermanding direction from Congress, we will not force the public to assume it" (Pet. App. 39).[11]

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[11]In suspension proceedings, as in cancellation proceedings, the Administrator's decision must be upheld by the courts if it is "supported by substantial evidence when considered on the record as a whole." 7 U.S.C. (Supp. V) 136n(b). The court of appeals held that the Administrator's decision is so supported (Pet. App. 12-24), and petitioner does not challenge this decision. Moreover, petitioner apparently does not contend that the Administrator's belief that petitioners bear the burden of persuasion was an essential element of his decision. Extensive evidence was introduced by the parties concerning the risks and benefits of heptachlor and chlordane. This is not, therefore, a case in which a pesticide's registration has been suspended on an otherwise inadequate record because the registrant failed to overcome a presumption in favor of suspension. To the contrary, the evidence of record favoring suspension is overwhelming. See Pet. App. 48-107. We submit, therefore, that decision on the question concerning the burdens of proof and persuasion would not be determinative of the outcome of this case; whatever the burden may be, the Administrator's decision is supported by substantial evidence and must be sustained.

CONCLUSION

The petition for a writ of certiorari should be denied.[12]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

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[12]The Secretary of Agriculture takes no position on whether the petition should be granted and will not file an independent memorandum in response to the petition.